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NO. 90-1599

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner,

v.

FRANK DENNIS FELIX.
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF THE RESPONDENT

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ISSUE PRESENTED FOR REVIEW

Whether a defendant may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in the overt acts of the conspiracy charge.

STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote, study and research the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices and procedures. The double jeopardy clause's bar against successive

prosecutions for the same offense is a fundamental right of citizens. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee. We believe that the adoption of the position taken by the Petitioner in the instant case would seriously undermine the Fifth Amendment guarantee against being twice put in jeopardy for the same offense.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the Petitioner and the Respondent have consented to NACDL's participation as amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with the Court.

SUMMARY OF THE ARGUMENT

The Respondent was previously prosecuted, convicted and sentenced for his conduct in connection with his efforts to establish a methamphetamine laboratory. The same conduct which was the basis for that prosecution was subsequently used by the government to prosecute, convict and sentence the defendant for conspiring to establish a methamphetamine laboratory. This is not a case in which the concern is simply with consecutive sentences for conduct which violates two criminal statutes and which were prosecuted in one case. Here, the issue involves the core concern of the double jeopardy clause: the right not to be twice tried for the same offense. The focus is not on Congressional intent in enacting two statutes which contain different essential elements, but on the conduct of the accused which the government proved as constituting the offense in both prosecutions. Because the same conduct was

the basis for both prosecutions, the latter prosecution was barred.

I. THE DOUBLE JEOPARDY CLAUSE BARS A PROSECUTION FOR CONSPIRACY TO MANUFACTURE METHAMPHETAMINE IF THE DEFENDANT WAS PREVIOUSLY PROSECUTED FOR ATTEMPTING TO MANUFACTURE METHAMPHETAMINE AND THE GOVERNMENT RELIES ON THE SAME CONDUCT TO PROVE BOTH OFFENSES

INTRODUCTION

The Double Jeopardy Clause has its genesis in Greek and Roman jurisprudence, Bartkus v. Illinois, 359 U.S. 121, 152 (1959)(Black, J. dissenting) and was firmly rooted in the common law of England. 4 W. BLACKSTONE, COMMENTARIES *335; Green v. United States, 355 U.S. 184, 187 (1957). It was elevated to the status of a "fundamental right" in Benton v. Maryland, 395 U.S. 784, 795 (1969): "Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice.'" Id. at 796. The underlying idea is that

> the State with all its resources and power should not be allowed to make

> repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. at 187.

The Double Jeopardy Clause embodies a number of protections for a criminal defendant. Though each of these protections can generally be characterized as ensuring that a defendant is not forced to run the gauntlet more than once for the same offense, the manifestations of this protection take many forms: The state may not retry a defendant if the appellate court determines that the evidence was insufficient in the initial trial. United States v. Burks, 437 U.S. 1 (1978). A new trial may not be

conducted if it follows a mistrial which results from intentional misconduct on the part of the state. United States v. Dinitz, 424 U.S. 600 (1976). A defendant may not be sentenced consecutively for the "same offense" even if prosecuted under separate criminal provisions. Blockburger v. United States, 284 U.S. 299 (1932). Following an acquittal, or a conviction the state may not again try the defendant for the "same offense." Green v. United States, 355 U.S. 184, 187 (1957). It is this latter protection -- barring a second trial for the "same offense" following a verdict and entry of final judgment -- which is at the crux of this case.

Within that category of cases, there are two recurring issues which have arisen in the last century: First, may the state retry the defendant under the same code section, but with different facts alleged? Ashe v. Swensen, 397 U.S. 436 (1970); Mars v. Mounts, 895 F.2d 1345 (11th Cir. 1990). Second, may the state

try the defendant for a different criminal offense which arose from the same criminal episode? Grady v. Corbin, 110 S.Ct. 2084 (1990). This case involves a unique combination of both of these issues. Here, the government has changed the code section under which the defendant is being tried -- first he was tried for attempt, second he was tried for conspiracy -- but relies on the same conduct as the basis for the prosecution. The other line of cases is also implicated here, because the government's effort to re-characterize the offense (from an attempt to a conspiracy) is an effort to change the operative factual allegations. Because the same criminal impulse, the same conduct, is the essence of both prosecutions, the second prosecution should have been barred.

If the facts of this case were analyzed under the standards employed to gauge the propriety of multiple punishments, the result might be different. But when analyzed under

the standards which are employed to gauge the propriety of successive prosecutions, the facts of this case lead to the conclusion that the second prosecution should have been barred. The Court of Appeals found that the government relied on the same conduct to prosecute the Respondent for the attempt offense as was used to prosecute him for the conspiracy. That is, his actual physical movements and state of mind were the subject of both the first and second prosecutions. The double jeopardy clause bars a subsequent prosecution where, as in this case, the government establishes an essential element of the second offense with conduct which constitutes an offense which was previously prosecuted.

A. EVOLUTION OF THE DOUBLE JEOPARDY BAR TO SUCCESSIVE PROSECUTIONS

The "same offense" issue in the context of successive prosecutions was raised over 100

years ago in In re Nielsen, 131 U.S. 176 (1889). The defendant pled guilty to unlawful cohabitation between October 15, 1885 and May 13, 1888. The second indictment charged Nielsen with committing the offense of adultery on May 14, 1888. This Court held the second indictment was barred. The test adopted by the Court was as follows:

> Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

Id. at 188. The Nielsen rule, which applies to successive prosecutions, remains viable to this day. Brown v. Ohio, 432 U.S. at 163-64; Grady v. Corbin, 495 U.S. at ____. Noteworthy about the Nielsen case is that as a matter of law, all cases of cohabitation do not necessarily require proof of the offense of

adultery. Though the Court dwelled on this subject throughout the course of the opinion, the statutes in question clearly did not require, for a conviction of cohabitation, that the offender also be committing the offense of adultery. Sexual intercourse was a required element of each offense, but a single man could cohabit with two unmarried women and thereby commit the offense of cohabitation, but not adultery. Thus, Nielsen directs that it is not permissible to prosecute a person in successive prosecutions for the same conduct even if the second offense is not, as a matter of law, included in the first. That is, the adultery prosecution was barred because the cohabitation offense, as a matter of fact, relied on proof of the adulterous conduct, even though, as a matter of law, one may commit either offense, without also committing the other.

All cases involving the successive prosecutions for different offenses trace

their heritage to Neilsen. In the past twenty years, the principal cases in this area include, Brown v. Ohio, 432 U.S. 161 (1977), Harris v. Oklahoma, 433 U.S. 682 (1977), Illinois v. Vitale, 447 U.S. 410 (1980) and, finally, last term Grady v. Corbin, 495 U.S. ___ (1990). But before these cases were decided, the jurisprudence of double jeopardy was developed in another area -- consecutive sentencing -- which impacted on the development in this area.

B. THE DEVELOPMENT OF THE CONSECUTIVE SENTENCE RULE

With regard to consecutive punishments for offenses tried at one time, the rule which applies is different than the successive prosecution standard. In a consecutive punishment situation, the question is not whether the defendant is being tried twice, but whether he may be punished twice for the same offense. In essence, the question is

whether Congress intended a defendant to be punished twice for conduct which violates more than one offense. The rule for determining whether two offenses are the "same" was announced in Blockburger v. United States, 284 U.S. 299 (1932):

> Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 304. The defendant was prosecuted in one indictment, (1) for selling morphine hydrochloride not in or from its original stamped package; and (2) for selling morphine hydrochloride not in pursuance to a written order. With regard to these two counts, there was but one sale -- one act. This Court upheld the consecutive sentences on these two

counts because each offense had as an essential element a provision not shared by the other.

Had Blockburger adhered strictly to Nielsen, the result may well have been different, because, as noted, adultery and cohabitation each have an essential element not shared by the other; yet, the prosecution in Nielsen was barred. Blockburger and Nielsen are not irreconcilable, however. They simply apply in different situations, and thus, may result in different conclusions.

C. THE DEVELOPMENT OF COLLATERAL ESTOPPEL AS AN ADDITIONAL BAR

Apart from the Blockburger and Nielsen strands of the double jeopardy fabric, one more strand was developed in the case of Ashe v. Swenson, 397 U.S. 436 (1970). There, the Court held that a defendant who was charged and acquitted of robbing a poker player, could not later be prosecuted for robbing another

player in the game. In a decision which required the trial court to undertake a factual inquiry into what had been decided previously, the Court held that even though the first and second trial did not literally involve the same offense -- that is, there was, by necessity different facts which had to be proved -- the second trial was barred by the doctrine of collateral estoppel. Because the first jury must have found that Ashe had not participated in the robbery, that fact had been "decided" and no further prosecution was permissible which required that the fact be decided otherwise.

Ashe's concern with the "same offense" issue related to whether the same facts were the subject of both prosecutions. Though the offenses were clearly different -- Knight was the victim in prosecution 1, while Roberts was the victim in prosecution 2 -- the offenses were the same in one important respect: each case required proof as a matter of fact that

the defendant was at the scene of the crime and perpetrated the robbery. Because it was decided in prosecution 1 that Ashe was not at the scene, he could not be prosecuted in case 2 for being at the scene.

D. THE SUCCESSIVE PROSECUTION ISSUE RE-EMERGES TWENTY YEARS AGO

Thus, when the Nielsen line of cases -- the cases which involved successive prosecutions for the same "conduct" but different statutes -- emerged once again in the late 1970s, the landscape was not the same as it was when Neilsen was decided 100 years earlier. The Court was confronted with a maze of different standards -- the Blockburger standard, the Ashe v. Swensen standard and the Nielsen standard. Between 1977 and 1980, three cases were decided involving successive prosecutions for different offenses. In Brown v. Ohio, 432 U.S. 161 (1977), the Court was asked to decide whether a defendant could be

prosecuted for theft of an auto, after having already been convicted of joyriding. At the outset, the Court held that, "It has long been understood that separate statutory crimes need not be identical -- either in constituent elements or in actual proof -- in order to be the same within the meaning of the constitutional prohibition." Brown at 164.

In deciding whether successive prosecutions would be permitted, the Court began by analyzing whether the offenses were the same for consecutive sentencing purposes. That is, Brown began by looking to Blockburger for the answer to the question. The analysis ended at that point because the offenses were determined to be the same under the Blockburger test. Explicitly, the Court held that Blockburger was not the only test for deciding whether successive prosecutions would be permitted. 432 U.S. at 166 n.6. Brown recognized that overcoming the Blockburger hurdle was not the end of the matter. Failing

to overcome the Blockburger test, however, will be the end of the matter. If Blockburger is satisfied, the next question focuses on the facts of the case, rather than the elements of the offense. For there may be cases in which Blockburger may be satisfied -- that is, the offenses contain elements not common to each other -- but the prosecution is barred for other reasons.

In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was convicted in a state court of felony murder. Later, he was prosecuted for armed robbery, the underlying predicate offense of the felony murder prosecution. The Court reversed, holding that in that case, the felony (armed robbery) was included, as a matter of fact, within the offense of felony murder, as proven. The two statutes, when read apart from the facts of the case, are not the same offense; clearly, armed robbery has elements which are not shared by the offense of murder, and vice

versa. But in that case, the armed robbery was a lesser included offense of felony murder, as proven. Harris, therefore, in the context of successive prosecutions under separate statutes, inaugurated the era of examining the facts of the case, rather than simply the code book, in determining whether a prior prosecution and conviction could bar a subsequent prosecution for the same conduct. It was a remarkably nonchalant beginning for this significant development in the law of double jeopardy: the per curiam opinion is a mere nine sentences long and cites as the principal authority In re Nielsen.[1]

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[1] The Court also cited Brown v. Ohio, decided less than two weeks earlier and Waller v. Florida, 397 U.S. 387 (1970), which involved issues which, if resovled, would have had a bearing on this case. In Waller, the defendant was prosecuted in municipal court for ordinance violations (disorderly breach of the peace and destruction of city property) and then prosecuted in the state court for grand larceny based on the same acts. The Court only decided that the municipal court and the state court were part of the same sovereign for double jeopardy purposes. The Court expressly refrained from deciding the question of whether the offenses were the same

Three years later, in Illinois v. Vitale, 447 U.S. 410 (1977), the Court acknowledged that the Blockburger test focused on the statute, without any regard to the particular facts of the case. Id. at 416. In Vitale, the defendant was found guilty of failing to properly slow down to avoid a collision. Later he was prosecuted for involuntary manslaughter, but the underlying offense was not determined. If the underlying offense which supported the involuntary manslaughter offense was failing to slow down, then the subsequent prosecution would face a considerable double jeopardy hurdle.[2] If, however, the state proved the involuntary manslaughter with proof of conduct other than

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for double jeopardy purposes: "Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question."

[2] Justice White did not specifically hold that in such a case, the subsequent prosecution would be barred; rather he wrote that the defendant's double jeopardy claim "would be substantial." Id. at 420.

the failure to slow down, then the prosecution could go forward. Because the conduct upon which the state planned to rely in the latter prosecution was not known, the state court erred in dismissing the indictment on the grounds of double jeopardy. The Court noted that under Harris, the appropriate inquiry was on the facts to be proved by the prosecution, not simply the codal elements of the offense.

E. GRADY V. CORBIN

Last term, this Court decided Grady v. Corbin, 495 U.S. ___ (1990), and held that the "substantial" double jeopardy claim envisioned by Justice White in Vitale was, in fact, a valid defense to a subsequent prosecution. The defendant committed a motor vehicle infraction which resulted in the death of another driver. He entered a guilty plea in Town Justice Court to the motor vehicle offense and then was indicted for manslaughter. The prosecutor filed a bill of

particulars identifying the three reckless acts which would be the basis for the homicide charge. Two of the three "acts" were the subject of the Town Justice Court convictions (Operating a vehicle in an intoxicated condition; failing to keep right of the median). Grady held that the second prosecution was barred by the double jeopardy clause. Again, the analysis begins, but does not end, with Blockburger. If the second prosecution fails the Blockburger test, the prosecution is barred; if Blockburger does not bar the second prosecution, then a second inquiry is undertaken: if the government, in order to establish an essential element of the offense will prove conduct that constitutes an offense for which the defendant has already been prosecuted, the prosecution is barred. 495 U.S. at _____.

Grady did not mark a dramatic departure from the settled double jeopardy law. Its result is virtually dictated by the decision

in In re Nielsen over a hundred years ago. It follows ineluctably from the decision in Harris v. Oklahoma. And it was explicitly foreshadowed in Illinois v. Vitale. Interestingly, in his otherwise comprehensive review of the historical precedents from the 18th and 19th century, Justice Scalia omitted any reference to In re Nielsen in his dissent to the decision in Grady. Nielsen clearly rejects the thesis advanced by Justice Scalia in that dissent. That is, even 100 years ago, successive prosecutions were barred even if, from a strictly legal point of view, one offense was not included in the other.

The reason that Blockburger is not the controlling test in successive prosecution cases is simple. Blockburger, is, in essence, a rule of statutory construction. It is a rule which seeks to divine whether Congress wanted a person to serve two consecutive terms for one act of selling drugs. Though it is couched in terms of double jeopardy and it has

been used as an aid in answering double jeopardy questions, it is primarily a test to be used in interpreting the will of the legislature. As the Court in Brown v. Ohio observed,

> "Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. See Gore v. United States, 357 U.S. 386 (1958)."

432 U.S. at 165.

The double jeopardy clause is fundamentally a protection against twice being put to trial for the same offense. Grady recognizes that the Blockburger test suffocates the guarantee against double jeopardy if it, alone, is the test for determining whether successive prosecutions

are permitted. The prohibition against successive prosecutions is the core concern of the Double Jeopardy Clause. Congress can do nothing to curtail that right, though Congress can easily increase punishments or draft criminal legislation in a manner which will permit consecutive sentences for different offenses tried at the same time. But Congress can do nothing to facilitate the power of the government to repeatedly prosecute a person for one criminal act.

> The Fifth Amendment's prohibition against placing a defendant "twice in jeopardy" represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the

> Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.

United States v. Jorn, 400 U.S. 470 (1971). The importance of this component of the double jeopardy clause led the Court in Abney v. United States, 431 U.S. 651 (1977), to grant the defendant the right to appeal pretrial the denial of a motion to dismiss on double jeopardy grounds.

> Where successive prosecutions are at stake, the guarantee [of the Fifth Amendment Double Jeopardy Clause] serves 'a constitutional policy of finality for the defendant's benefit.' United States

v. Jorn, 400 U.S. 470, 479 (1971)(plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see Ashe v. Swensen, 397 U.S. 436 (1970) . . . and from attempts after a prior conviction and sentence, see Green v. United States, 355 U.S. 184 (1957).

Brown v. Ohio, 432 U.S. at 166.

F. UNITED STATES V. FELIX: CONTEMPORARY APPLICATION OF NEILSEN AND GRADY

Against this background -- the history of Neilsen, Brown, Harris and Grady v. Corbin, as well as the parallel (though sometimes perpendicular) historical development of the consecutive sentence rule of Blockburger -- the decision in the lower court in this case was correct.

What both the Tenth Circuit in this case and the Second Circuit in United States v.

Calderone, 917 F.2d 717 (2d Cir. 1990), recognized is that conspiracy prosecutions, and especially drug conspiracy prosecutions, rarely focus on the agreement between two people. See also United States v. Uselton, 927 F.2d 905 (6th Cir. 1991)(remanding case to the district court to determine whether prior conspiracy to violate Hobbs Act acquittal erected double jeopardy bar to trial for substantive Hobbs Act violation); United States v. Barrett, 933 F.2d 355 (6th Cir. 1991)(suggesting that Grady could bar successive conspiracy and attempt prosecutions for the same conduct; re-affirming, however, that consecutive sentences for the attempt and the conspiracy was permissible if the offenses were prosecuted together).

The archetypical drug prosecution focuses on the act which is the aim of the alleged conspiracy and the jury is asked simply to infer the existence of the agreement from proof of the completed or attempted offense.

And where, as here, the conduct of the defendant was previously used to convict the defendant of the substantive offense (or, as here, for attempting to commit the substantive offense), the government may not present the exact same evidence in a second prosecution for conspiracy. The government may prosecute the defendant for the substantive offense and the conspiracy in one trial and the court may impose consecutive sentences. But successive prosecutions for the attempted offense and the conspiracy are not permissible if the same conduct which supported the attempted offense is relied on to prove the conspiracy.

The use of the conduct of the defendant to prove his membership in the conspiracy is routine. Consider, for example, the standard Pattern jury instruction in criminal drug conspiracy cases:

> To prove the existence of a conspiracy, or an illegal agreement, the government is not required to

> produce a written contract between the parties or even produce evidence of an express oral agreement spelling out all of the details of the understanding. . . .The government must prove that the defendant and at least one other person knowingly and deliberately arrived at some type of agreement or understanding that they, and perhaps others, would [violate a law] by means of some common plan or course of action as alleged in Count ___ of the indictment. . .

DEVITT, BLACKMAR & O'MALLEY, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §28.04 (1990).

The instructions in the second prosecution of this case left the jury with no doubt that proof of the defendant's conduct was all that was really needed to support the conspiracy prosecution:

The agreement or understanding that constitute conspiracy need not take any particular form. It need not be in writing. The agreement or understanding may be expressed or may be wholly implied. It is not necessary to find an agreement expressed in words inorder to find a conspiracy. Now the Government is not required to prove a conspiracy by direct testimony or evidence. Ordinarily, a conspiracy can be proved only be inferences drawn from relevant and competent circumstantial evidence. However, the fact that a crime may have been committed does not mean there was a conspiracy to commit such crime. . . . The law allows you, as members of the jury, to infer the existence of a conspiracy from things actually done, taking the conduct of the

parties who are charged with the conspiracy. Thus, whether an unlawful conspiracy is proved is to be judged by what the parties actually did as well as the words they used.

(Transcript of Oklahoma trial, pp. 1073-75).

Significantly, the Court also directed the jury that the government was required to prove that the defendant engaged in overt acts in furtherance of the conspiracy (Oklahoma transcript pp. 1076-77) and it is conceded here that the overt acts which the government proved were the same acts which were the subject of the Missouri prosecution. Thus, there can be no argument that the conduct prosecuted in Missouri -- the acts of the defendant -- became an essential element of this prosecution: the overt acts of the conspiracy.

Even apart from the government's use of the same conduct to prove the existence of an

attempt in Missouri and the overt acts in Oklahoma, the appellate decisions in conspiracy cases have always focused on the defendant's conduct, his actions, to support a conspiracy conviction. In United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), the court held, characteristically, that if the government proves that a defendant was purchasing heroin from a middleman who he knew was participating in a large organization which parcels out various tasks among its members, the jury can conclude that the defendant agreed with those members even if he did not know their identities or locations. That is, the defendant's conduct, alone, is sufficient to establish his culpability for being a member of a conspiracy with members who he does not know. In United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978), the Tenth Circuit upheld a conspiracy conviction where the only proof was the defendant's repeated drug transactions. Over the course

of the last several years, every Circuit has upheld conspiracy convictions on the basis of the defendant's conduct, his participation in the transaction, and simply inferred the existence of an agreement. United States v. Iglesias, 915 F.2d 1524 (11th Cir. 1990) (defendant's participation in transaction supported conspiracy conviction); United States v. Cea, 914 F.2d 881 (7th Cir. 1990)(Defendant's participation in transaction supported conspiracy conviction); United States v. Chindawongse, 771 F.2d 840 (4th Cir. 1985)(Defendant's participation in transaction supported conspiracy conviction); United States v. Ospina, 739 F.2d 448 (9th Cir. 1984)(Defendant's participation in transaction supported conspiracy conviction); United States v. Medina, 887 F.2d 528 (5th Cir. 1989)(Defendant's participation in transaction supported conspiracy conviction); United States v. Sobamowo, 892 F.2d 90 (9th Cir. 1989)(Defendant's participation in transaction

supported conspiracy conviction); United States v. Sophie, 900 F.2d 1064 (7th Cir. 1990)(Defendant's conduct in selling drugs supported conspiracy conviction); United States v. Paiva, 892 F.2d 148 (1st Cir. 1989)(Defendant's conduct in selling drugs supported conspiracy conviction); United States v. Kelly, 892 F.2d 255 (3rd Cir. 1989)(Defendant's participation in manufacturing of drugs supported conspiracy conviction); United States v. Simpson, 901 F.2d 1223 (5th Cir. 1990)(Defendant's participation in drug transactions supported conspiracy conviction).

What these cases reveal is that the conduct of the defendant is the basis for the conspiracy charge in the same way that Thomas Corbin's driving too fast and crossing the center line was the basis for the manslaughter charge, and just as Mr. Neilsen's adulterous conduct was the same as his cohabitation conduct. Though the act of attempting to

manufacture narcotics is not, as a matter of law, an essential element of the offense of conspiring to do so, if the government proves the existence of the conspiracy solely by proving the attempt, then if the transaction was earlier prosecuted as an attempt, the subsequent prosecution is barred. As this Court observed two years ago, "In conspiracy cases, the agreement 'is all but synonymous' with the offense itself.'" United States v. Broce, 488 U.S. 563 (1989); United States v. Calderone, 917 F.2d 717, 721 (1989); see also Calderone, 917 F.2d at 725 (Newman, J. concurring)("in prior conspiracy prosecution, defendants were prosecuted for [the overt acts]").

Here the lower court held, as a factual matter, not as a legal matter, that the government relied on the same conduct in the first and second prosecutions to prove the

elements of the offense.[3] The same conduct was used to prove that the defendant attempted to commit the crime and to prove that the defendant committed overt acts in furtherance of the conspiracy to commit the crime. The government conceded in the second trial that the conduct to be relied upon in that trial "was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri." United States v. Felix, 926 F.2d 1522, 1530 (10th Cir. 1991). The two indictments, when laid side by side, allege virtually the same facts, the Oklahoma indictment including the entire period of time alleged in the Missouri indictment. The Tenth Circuit found that the attempt offense in Missouri occurred from the Spring of 1987 through August 31, 1987, while

[3] The Tenth Circuit in this case, the Second Circuit in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), and the Sixth Circuit in United States v. Uselton, 927 F.2d 905 (6th Cir. 1991), therefore, all agree that the issue presents initially a factual question.

the Oklahoma indictment alleged that the conspiracy lasted from "about" May 1, 1987, through August 31, 1987.

But of greater importance is the fact that the decision of the Tenth Circuit was not premised simply on the indictment, but on the proof at trial. It was the decision of that Court applying the Grady standard correctly, that the conduct prosecuted in Missouri and Oklahoma was the same. It was not simply a question of what evidence the prosecutor relied on in proving entirely different offenses; the evidence of Felix's purchase of supplies and chemicals was the crime, not simply evidence of the crime. That was the conduct which was prosecuted and for which he is being punished -- twice. The issue presented to this Court, therefore, is not whether the lower court erred as a matter of law, but whether it erred as a matter of fact in concluding that the same conduct was prosecuted in two successive prosecutions.

Here, unlike in Vitale, we are not simply speculating about what the "incidents" of the offense are. This is not a pretrial motion to dismiss, but an analysis of the incidents upon which the government actually did rely. Thus, unlike in Vitale, the appellate court could determine with precision, that the same incidents were presented in this case as in the earlier case.

The fact that Felix purchased precursors from the supplier may not be an essential element of the offense of conspiracy. It is the only evidence, however, that he did conspire with others. Thus, it is this conduct which is being prosecuted again. Furthermore, because the judge instructed the jury that an overt act had to be proved, that conduct was, at least in this prosecution, an essential element of the offense.

G. THE DECISION IN DOWLING IS NOT INCONSISTENT WITH GRADY OR THE POSITION ADVANCED BY RESPONDENT IN THIS CASE

The government's argument in this case misconstrues the fundamental distinction drawn by this Court in Grady between the same "evidence" and the same "conduct." The government's reliance on Dowling v. United States, 493 U.S. 342 (1990), demonstrates the flaw in their argument. For the issue in this case is not whether the government may introduce evidence of a prior crime, or introduce evidence which was earlier introduced in another trial. Dowling represents a limitation -- or perhaps a delineation of -- the scope of Ashe v. Swenson, not a limitation of In re Nielsen. The fact that Ashe had previously been acquitted of robbing one poker game did not mean that in a trial for robbing another poker game on a different occasion, evidence that he robbed the game for which he was tried and

acquitted could not be introduced. Thus, evidence of the conduct which led to an acquittal could be introduced in a trial for separate conduct. But according to Ashe, the conduct for which he was tried initially could not be the subject of a separate prosecution involving the same conduct.

The issue here is whether the government may prosecute Felix for the same conduct which was the subject of a prior prosecution. It is the conduct of Felix, the actions he took, which is the focus of the Grady-mandated analysis. Simply put, the question is whether Felix's purchase of precursor chemicals and negotiation to sell those chemicals can be the basis for two prosecutions. Grady directs that the answer to that question is no.

Dowling, on the other hand, is concerned simply with the admissibility of evidence. The same evidence may be introduced against a defendant countless times in consecutive prosecutions. That evidence may relate to an

instance of previously uncharged misconduct, a prior conviction, or conduct which led to a prior acquittal. What Grady directs, however, is that if the same conduct was the subject of a prior proceeding, that conduct may not be the subject of another proceeding.

To be sure, in examining the conduct which is the subject of the two prosecutions, care must be taken to ensure that the conduct is, in fact, the same before the double jeopardy bar applies. Thus, in Grady, if the prosecutor in New York alleged that it was the defendant's failure to pay attention which served as the predicate for the homicide offense, there would be no bar since it was other vehicular infractions which were previously prosecuted. That is, the fact that the defendant was prosecuted for "related" violations, violations which occurred contemporaneously with the failure to pay attention violation would not operate as a bar. Similarly, in Vitale, Justice White

pointed out that if another predicate offense was relied on, then there would be no bar to a subsequent prosecution. But the availability of other "conduct" to support a second prosecution does not change the fundamental rule that the same conduct cannot be the basis of the subsequent prosecution. The hypotheses in Vitale and Grady simply re-affirm the fundamental rule.

CONCLUSION

The evolution of double jeopardy jurisprudence in recent years has kept pace with the explosion of new criminal offenses which crowd the criminal code. Unlike the past, one criminal episode may subject the offender to a score of prosecutions. The Grady interpretation of the Fifth Amendment ensures that the goals of the protection as envisioned by the Constitution, are fulfilled. Those goals -- preventing the prosecution from being able to "rehearse" its proof for use in a later trial; preventing the defendant from

being subjected to repeated and costly trials and terminating the anxiety of a criminal defendant after one prosecution -- are meaningless if one criminal episode may be prosecuted over and over by the simple legerdemain of attaching a new label to the same conduct.

What Grady imported into the double jeopardy analysis was the necessity for a highly fact-intensive inquiry by the trial judge into the proof which the government intends to use in the upcoming trial. What conduct of the defendant is it that will be the focus of the prosecution? What did he do to violate the law? The focus of this inquiry has drifted far from the earlier preoccupation with the elements of the offenses which characterized the sterile Blockburger test. No longer does the trial court simply place the two statutes on top of one another and see if edges of each can be seen outside the boundaries of the other.

Yet, it is that type of mechanistic approach which the government urges the Court to adopt in this case: as in the old days, the government points out that a conspiracy offense requires only an agreement, while the substantive offense requires no agreement, but requires tangible conduct on the part of the offender. Therefore, the government argues, the defendant can be sentenced consecutively for the substantive and conspiracy offenses (a proposition which the NACDL does not dispute) and tried in successive trials (a proposition which the lower court in this case and the NACDL rejects). Grady dictates that the courts must embark on a more sophisticated factual inquiry before permitting a person to be tried repeatedly for the same conduct.

Frank Felix has been tried and convicted for his participation in the venture to manufacture methamphetamine. Once is enough.

Respectfully Submitted,

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